

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CLAYTON WAYNE ROBERTSON,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11327
Trial Court No. 3AN-11-2805 CR

MEMORANDUM OPINION

No. 6257 — November 25, 2015

Appeal from the Superior Court, Third Judicial District,
Anchorage, Gregory A. Miller, Judge.

Appearances: Michael T. Schwaiger, Assistant Public
Defender, and Quinlan Steiner, Public Defender, Anchorage, for
the Appellant. Ann B. Black, Assistant Attorney General,
Office of Criminal Appeals, Anchorage, and Michael C.
Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard, Judge.

Judge MANNHEIMER.

Clayton Wayne Robertson appeals his convictions on two counts of second-degree controlled substance misconduct (one count of delivering heroin, and one count of possessing heroin with intent to deliver). He argues that the evidence against him was obtained as a result of an investigative stop that was not supported by reasonable suspicion, followed by an arrest that was not supported by probable cause. For the

reasons explained in this opinion, we conclude that both the investigative stop and the later arrest were legally justified, and we therefore affirm Robertson's convictions.

Underlying facts

In late 2010 and early 2011, the Anchorage police were investigating a man named Lowell Thompson for drug trafficking. An undercover officer arranged two purchases of heroin from Thompson. On each of these occasions, Thompson could not complete the transaction until "his guy" (*i.e.*, his supplier) arrived with the heroin.

Toward the end of January 2011, the undercover officer arranged a third heroin purchase from Thompson. This time, Thompson arrived at the pre-arranged location as the passenger in a car. After the driver of the car parked in front of the undercover officer's vehicle, Thompson got into the officer's vehicle and sold him a half-gram of heroin.

During this third transaction, the undercover officer told Thompson that he was interested in purchasing a larger quantity of heroin. Ultimately, the officer agreed to purchase fifteen grams of heroin from Thompson, with the condition that this sale would be preceded by a smaller purchase, so that the officer could sample the product.

The officer and Thompson agreed to meet at an Anchorage restaurant for the "sample" purchase. An Anchorage police surveillance team watched as Thompson and his wife arrived at the restaurant in a blue Chevrolet Lumina. The couple parked the car and entered the restaurant together, but then Thompson left the restaurant by himself.

The officers who were monitoring this purchase watched Thompson after he left the restaurant. They saw him walk up to a black Ford Contour in the restaurant parking lot. When Thompson returned to the restaurant a short while later, he had two grams of heroin for the undercover officer.

When the officers ran the license plate numbers of the Ford Contour, they discovered that it was registered to Clayton Robertson (although it appeared that another man had been driving it that night).

Further investigation revealed that Robertson was on probation for third-degree weapons misconduct and fourth-degree controlled substance misconduct, and that he owned two cars: the black Ford Contour and a silver Mercedes.

After the police discovered that Robertson was on probation for a drug offense, they decided that their investigation would end with the fifth purchase (*i.e.*, the fifteen-gram purchase). The undercover officer arranged to have this fifth purchase take place at the same restaurant.

On the day of this pre-arranged purchase, Thompson arrived in the blue Chevrolet Lumina, and he parked on the north side of the restaurant parking lot. The undercover officer parked on the south side of the lot. The police surveillance team also observed that Robertson's black Ford Contour was parked at the north end of the lot. There were two men inside the Ford Contour, but neither of them was Robertson.

A silver Mercedes also pulled into the parking lot, but the officers could not see inside this vehicle.

Thompson crossed the parking lot, got into the undercover officer's car, and asked him if he had the money they had agreed on. The officer told Thompson that he was unwilling to deliver the money until he saw a sample of the heroin. Thompson then got out of the officer's car and walked up to talk to the men in the Ford Contour. When Thompson returned to the undercover officer's car, he told the officer that his supplier was not willing to provide a sample until the money was paid. In response, the undercover officer told Thompson that the deal was off unless he received a sample.

Upon hearing this, Thompson pulled out his phone and began talking with his suppliers. He eventually got out of the officer's car, got back inside his blue Chevy

Lumina, and drove some distance away. During this time, the police surveillance team saw a man exit the silver Mercedes and get into the black Ford Contour.

Shortly thereafter, Thompson made a circuit of the parking lot: he got into the black Contour, then got out and re-entered the blue Lumina, then drove back to the undercover officer's car and gave the officer a sample of heroin. Upon receiving the sample of heroin, the undercover officer gave the "takedown" signal — *i.e.*, he directed the other officers to come and arrest the participants.

The officers surrounded and secured the black Ford Contour, and they arrested its occupants. At the same time, Sergeant Kathleen Lacey approached the silver Mercedes and contacted the driver, who turned out to be Robertson.

As Sergeant Lacey described later (in her testimony at the evidentiary hearing in the superior court), she was stationed at the north end of the restaurant parking lot. From this vantage point, she saw a man (later identified as Christopher Parker) get out of Robertson's silver Mercedes and get into the driver's side of the Ford Contour. Lacey then saw Thompson enter the Ford Contour on the passenger side.

Shortly thereafter, Lacey received the "takedown" signal, and she assigned herself the task of contacting the occupant of the silver Mercedes.

Lacey first moved her vehicle to block the path of the Mercedes, and then she walked up to the passenger door of the Mercedes and tapped on the window. Lacey's police badge was visible at her neck, but she did not have her weapon drawn.

Robertson rolled down the passenger-side window, and Lacey asked Robertson if he knew the man who had just gotten out of the Mercedes and gone over to the Ford Contour. Robertson replied that he did not know this man. Lacey then asked Robertson what his name was, and he truthfully identified himself.

Lacey knew (from a prior briefing) that Robertson was on probation for weapons and drug offenses. She asked him to get out of his vehicle. As Robertson was

getting out of the Mercedes, Lacey looked to see if there were any weapons in his immediate reach, and she saw a baggie of heroin on the center console of the car. At this point, Lacey decided to arrest Robertson. Once Robertson was outside the vehicle, Lacey handcuffed him and performed a pat-down search of his person.

Following Robertson's arrest, the police obtained a warrant to search his Mercedes. Inside the vehicle, the police found evidence that Robertson was involved in heroin trafficking — including the baggie that Lacey had observed on the console.

Robertson's suppression motion, and the superior court's resolution of his claims

Following his indictment, Robertson filed a motion asking the superior court to suppress the evidence obtained from him and his car. Robertson argued that Sergeant Lacey's initial approach to his car was an investigative stop that was not supported by reasonable suspicion, and that his later arrest was not supported by probable cause.

In response to this motion, the superior court held an evidentiary hearing. Based on the testimony presented at this hearing, the superior court concluded that Lacey's initial approach to the silver Mercedes and her contact with Robertson were justified by reasonable suspicion — *i.e.*, supported by specific and articulable facts indicating that Robertson was connected to the heroin sale that occurred between Thompson and the undercover officer on the other side of the restaurant parking lot. The court further concluded that Lacey's arrest of Robertson was justified because, by the time of the arrest, Lacey had probable cause to believe that Robertson was an accomplice in that heroin transaction.

Robertson's arguments on appeal

Robertson first argues that the superior court's conclusions are flawed because the court should not have credited Sergeant Lacey's testimony at the evidentiary hearing. Robertson claims that various details of Lacey's police report are at odds with her testimony at the evidentiary hearing — and, because of these discrepancies, he contends that the superior court could not reasonably have concluded that Lacey's testimony at the hearing was credible.

We have examined both Lacey's testimony and her police report. There are discrepancies between the two — as the superior court acknowledged in its decision. But Lacey was cross-examined about these discrepancies. The superior court heard Lacey's answers to these questions, and the court concluded that the discrepancies did not undermine Lacey's credibility as a witness, nor did it cast significant doubt on her chronology of events — in particular, her testimony that the baggie of heroin was in plain view on the console.

It was the superior court's role to evaluate the credibility of the testimony and make findings of historical fact.¹ Our review of the record in this case shows that the superior court's findings are not clearly erroneous. We therefore uphold them.

Robertson next argues that, even under the superior court's findings of fact, Lacey's approach to Robertson in the silver Mercedes constituted an investigative stop that was not justified by reasonable suspicion, and that Lacey's ensuing arrest of Robertson was not supported by probable cause.

But as the superior court noted in its decision, the police had several articulable reasons to believe that Robertson was involved in the drug transaction.

¹ See *Slwooko v. State*, 139 P.3d 593, 598 (Alaska App. 2006); *Wilburn v. State*, 816 P.2d 907, 911 (Alaska App. 1991).

Robertson's other vehicle (the black Ford Contour) was involved in one of the previous heroin purchases between the undercover officer and Thompson, and this same black Contour was at the scene during the fifth and final heroin purchase. The police knew that Robertson also owned the silver Mercedes, and the police saw a man get out of Robertson's silver Mercedes and enter the nearby black Contour shortly before Thompson returned to the undercover officer with the sample of heroin.

The superior court concluded that these facts gave the officers reason to suspect that Robertson and his silver Mercedes were involved in the sale of heroin that had just occurred in the restaurant parking lot. Thus, the court ruled, Sergeant Lacey was justified in blocking the Mercedes with her car before she approached Robertson. We agree.

The superior court also concluded that these facts, combined with Lacey's observation of the baggie of heroin on the console of the Mercedes, provided probable cause for Robertson's arrest. Again, we agree.

For these reasons, the superior court properly denied Robertson's suppression motion.

Conclusion

The judgement of the superior court is AFFIRMED.